

VIA ECFS

EX PARTE

January 12, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition of Feature Group IP for Forbearance from Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules, WC Docket No. 07-256*

Petition of the Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and Commission Orders on the ESP Exemption, WC Docket No. 08-8

Dear Ms. Dortch:

tw telecom inc., One Communications Corp., and Cbeyond, Inc., through their undersigned counsel, hereby submit this letter in the above-referenced proceedings to urge the Commission to deny Feature Group IP's petition for forbearance ("Petition").¹ As discussed herein, the Petition must be dismissed because: (1) it is procedurally defective; and (2) it fails to satisfy the forbearance standard under Section 10 of the Communications Act ("Act").²

I. Feature Group IP's Petition Must Be Rejected Because Grant Of The Petition Would Not Achieve The Outcome Feature Group IP Seeks.

As the record makes clear, Feature Group IP's Petition is procedurally defective because grant of the Petition would not provide Feature Group IP with the outcome it seeks.³ Feature

¹ Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b), WC Dkt. No. 07-256 (filed Oct. 23, 2007) ("Petition").

² 47 U.S.C. § 160.

³ See, e.g., Letter from Brad E. Mutschelknaus, Counsel, Broadview Networks, Inc. et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-256, at 7 (filed Dec. 19, 2008) ("Broadview et al. Ex Parte Letter"); tw telecom et al. Comments at 4-5; CenturyTel Comments

Group IP requests forbearance from Section 251(g) of the Act and its implementing rules to the extent that they impose access charges on certain IP-enabled voice traffic (“VoIP traffic”).⁴ According to Feature Group IP, if its forbearance request is granted, the reciprocal compensation regime under Section 251(b)(5) would govern the termination of such traffic.⁵ But the Commission has already concluded that granting a forbearance petition would not, by itself,

at 4-5; Verizon Comments at 3. (Unless otherwise indicated, all references to comments and reply comments are to those filed in WC Dkt. No. 07-256). In a very similar forbearance proceeding, a number of parties argued that the petitioner, Core Communications, Inc. (“Core”), was not required to comply with Section 251(g) and therefore could not request forbearance from that provision and its implementing regulations. *See Petition of Core Communications, Inc. for Forbearance from Section 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, 22 FCC Rcd. 14118, ¶ 11 (2007) (“*Core Forbearance Order*” or “*Core*”). Core responded that it was a telecommunications carrier and therefore had standing under Section 10(c) of the Act. *Id.* In this proceeding, Feature Group IP has made the same argument in response to similar attacks on its standing. *See, e.g.,* Feature Group IP Reply Comments at 6 (arguing that all Feature Group IP companies are competitive local exchange carriers providing telephone exchange or exchange access service “to new-technology users” and enhanced service providers “seeking intermediation between the Internet and the narrowband PSTN.”). *See also id.* at 8-12. As it held in *Core*, however, the FCC need not decide this question because it can deny the instant Petition on other grounds. *See Core Forbearance Order* ¶ 11.

⁴ Specifically, Feature Group IP seeks forbearance from enforcement of “Section 251(g), the exception clause of Rule 51.701(b)(1), and, where applicable, Rule 69.5(b) to the extent that they impose interstate or intrastate switched access charges on IP-PSTN and incidental PSTN-PSTN Voice-embedded IP communications.” Petition at 47 (emphasis added). While the nature of Feature Group IP’s request is arguably hypothetical or conditional, it is worth noting that Joint Commenters do not urge denial of the Petition on that basis. Therefore, the D.C. Circuit Court of Appeals’ admonishment that “the Commission may not refuse to consider a petition’s merits solely because the petition seeks forbearance from uncertain or hypothetical regulatory obligations” is irrelevant here. *AT&T v. FCC*, 452 F.3d 830, 837 (D.C. Cir. 2006). As discussed *infra*, Joint Commenters urge denial of the instant request on the procedural ground that grant of the Petition will not achieve the result sought by the Petitioner.

⁵ *See* Petition at 31 (arguing that post-forbearance, “all IP-PSTN and incidental PSTN-PSTN traffic exchanged by a LEC and Feature Group IP within the same LATA as the PSTN end-user would be exchanged on a ‘minute-is-a-minute’ basis pursuant to Section 251(b)(5) or the *ISP Remand Order* . . .”); *see also* Feature Group IP Reply Comments at 16 (arguing that the goal of its Petition is “to obtain a result where the intercarrier compensation arrangement *as between Feature Group IP and any interconnecting LECs* is that governed by § 251(b)(5) and § 251(d)(2)”) (emphasis in original).

achieve this outcome. In response to a *virtually identical*⁶ forbearance request by Core Communications, the FCC held that:

Section 251(g) preserves pre-Act compensation obligations and restrictions for “exchange access, information access, and exchange services for such access . . . until such restrictions and obligations are explicitly superseded *by regulations prescribed by the Commission.*” Because section 251(g) explicitly contemplates affirmative Commission action in the form of new regulation, we find that forbearance from section 251(g) would not give Core the relief it seeks, because the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to section 251(g).

Core Forbearance Order ¶ 14 (emphasis in original). Accordingly, the instant Petition must be denied for the very same reason.⁷

Feature Group IP attempts to distinguish the *Core* decision by arguing that “the traffic covered by Feature Group IP’s petition” is not the same as that at issue in *Core*.⁸ But this is a distinction without a difference. To the extent that Section 251(g) applies to the termination of VoIP traffic, forbearance from that provision is insufficient to trigger application of reciprocal compensation to VoIP traffic for exactly the same reason it was insufficient to trigger the application of reciprocal compensation to the traffic at issue in *Core*’s petition. In both cases, the FCC must affirmatively prescribe regulations in order for reciprocal compensation to replace the

⁶ Core sought forbearance from Section 251(g) and its implementing rules “to the extent they apply to or regulate the rate for compensation for switched ‘exchange access, information access, and exchange services for such access to interexchange carriers and information service providers’ pursuant to state and federal access charge rules” and “[a]ny limitation, by [Commission] rule or otherwise, on the scope of section 251(b)(5) that is implied from section 251(g) preserving receipt of switched access charges.” Petition of Core Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Rate Regulation Pursuant to § 251(g) and for Forbearance from Rate Averaging and Integration Regulation Pursuant to § 254(g), WC Dkt. No. 06-100, at 2 (filed Apr. 27, 2006). Feature Group IP seeks forbearance for “Voice-embedded Internet communications” from “Section 251(g) of the Act, insofar as it applies to the receipt of compensation for switched ‘exchange access, information access, and exchange services for such access to interexchange carriers and information service providers,’ pursuant to state and federal access charge rules” and “any limitation on the scope of Section 251(b)(5) that is implied from Section 251(g) preserving LEC receipt of interstate switched access charges.” Petition at 24.

⁷ See also, e.g., NECA et al. Comments at 8; AT&T Comments at 17; Letter from Mary Albert, Assistant General Counsel, COMPTel, Steve Morris, Associate General Counsel, NCTA, and Glenn Reynolds, VP-Policy, USTA, to Marlene H. Dortch, Secretary, FCC, at 3 (filed Jan. 8, 2009) (“COMPTel et al. Ex Parte Letter”).

⁸ Feature Group IP Reply Comments at 29 (emphasis in original).

regulatory regime applicable pursuant to the FCC's Section 251(g) authority. Forbearance from Section 251(g) alone cannot achieve Feature Group IP's stated objective.⁹

The inability to obtain the requested relief via forbearance is a sufficient basis on which to deny a forbearance petition. In the *Fones4All Forbearance Order*,¹⁰ for example, the FCC rejected the petitioner's request for forbearance from the rule eliminating access to unbundled local switching because such forbearance would not result in an *affirmative* decision to *require* unbundling, as sought by the petitioner. The Commission held as follows:

[t]he Fones4All Forbearance Petition seeks to use the section 10 forbearance provision to create new section 251 unbundling obligations. . . . The result Petitioner seeks is unavailable in this context. . . . In key part, Petitioner critically misunderstands the result of a decision to forbear from rule 51.319(d). If we were to forbear from the local circuit switch unbundling prohibition in the suggested situations, . . . such forbearance would still not result in a Commission decision to require incumbent LECs to unbundle that network element.

Id. ¶¶ 7-9 (internal footnotes omitted). Last month, the Ninth Circuit Court of Appeals expressly affirmed this rationale.¹¹ Similarly, in the *Iowa Telecom Forbearance Order*, the FCC denied forbearance on the basis that forbearance from the requested universal service rules would not give the petitioner the requested relief, which was creation of a new category of high-cost

⁹ As the FCC has noted, the only way to achieve this objective is through a rulemaking. *Core Forbearance Order* (n.55). *See id.* (holding that "the Commission could decide to subject all traffic to the reciprocal compensation regime in section 251(b)(5) through new regulation; however, such action would have to occur in the context of a rulemaking proceeding"); *see also*, e.g., Verizon Comments at 5, 7-8; Embarq Reply Comments at 20; USTelecom Comments at 2. As the Commission emphasized, however, this fact does not mean that its denial of Core's petition was based on the pendency of an intercarrier compensation rulemaking proceeding. *Core Forbearance Order* n.55. Rather, it only means that Core's petition was procedurally defective because Core could not obtain its desired outcome through forbearance. The situation is no different here.

¹⁰ *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, Memorandum Opinion and Order, 22 FCC Rcd. 11125 (2006) ("*Fones4All Forbearance Order*").

¹¹ *See Fones4All Corp. v. FCC*, No. 06-75388, 2008 U.S. App. LEXIS 25277, at *24 (9th Cir. Dec. 16, 2008) ("The difficulty with Fones4All's position now is that forbearance from this regulation would not reinstate the requirement that the ILECs offer unbundled services to the CLECs. Even if Fones4All were not required to migrate its customers off ILEC switching, the ILECs would not be required to provide the switching. It is for that reason that the FCC denied the petition for forbearance, and it is for that reason we must uphold the denial.").

universal service support.¹² Consistent with this precedent, Feature Group IP's Petition must be denied as procedurally defective.

II. Feature Group IP's Petition Must Be Rejected Because It Fails To Satisfy The Requirements Of Section 10(a) Of The Act.

As the record underscores,¹³ the Commission rejected Core's virtually identical request for forbearance from Section 251(g) and its implementing rules for failure to comply with all three statutory criteria in Section 10(a).¹⁴ There is no reason to depart from this precedent here.

Section 10(a) provides that the Commission shall forbear from a regulation or provision if it determines that: (1) enforcement of such regulation or provision is not necessary to ensure that charges or practices remain just and reasonable and are not unjustly or unreasonably discriminatory; (2) "enforcement of such regulation or provision is not necessary for the protection of consumers"; and (3) "forbearance from applying such provision or regulation is consistent with the public interest."¹⁵ Feature Group IP argues that these requirements are met because forbearance from Section 251(g) would, among other things, "reduce regulatory uncertainty,"¹⁶ spur innovation,¹⁷ increase network investment,¹⁸ and "promote competition."¹⁹ But these arguments fail for several reasons.

¹² See *Iowa Telecom Petition for Forbearance Under 47 U.S.C. § 160(c) from the Universal Service High-Cost Loop Support Mechanism*, Order, 22 FCC Rcd. 15801, ¶ 7 (2007) ("*Iowa Telecom Forbearance Order*") ("As an initial matter, we conclude that forbearance from rules 36.601-36.631 . . . would not give the Petition the relief it seeks. Iowa Telecom seeks to use section 10 forbearance to create a new category of high-cost universal service support. . . . Section 10 is not the proper procedural device to request such relief. First, forbearance from these rules would not result in Iowa Telecom receiving support under the non-rural mechanism Second, contrary to Iowa Telecom's contention, the non-rural high-cost support mechanism is not a default rule of general applicability We therefore deny the Petition.").

¹³ See, e.g., Broadview et al. Ex Parte Letter at 7-8; COMPTTEL et al. Ex Parte Letter at 3; NECA et al. Comments at 7.

¹⁴ See *Core Forbearance Order* ¶¶ 12-16.

¹⁵ 47 U.S.C. § 160(a)(1)-(3).

¹⁶ Petition at 47.

¹⁷ See *id.* at 49, 53-55.

¹⁸ See *id.* at 54.

¹⁹ *Id.* at 47.

First, even if granting forbearance were to trigger application of reciprocal compensation to the termination of VoIP traffic (which it would not), Feature Group IP has failed to demonstrate that reciprocal compensation is a reasonable rate absent other changes to the Commission's rules. As the Commission recognized in rejecting Core's petition for failure to comply with the requirements of Section 10(a)(1), "changes to one aspect of intercarrier compensation 'cause substantial changes to other forms of intercarrier compensation, universal service support, interconnection arrangements, and end user rates.'"²⁰ Whether a particular rate is reasonable for the termination of a certain category of traffic depends on whether the FCC makes appropriate adjustments to these other aspects of the regulatory regime in order to accommodate that rate. For example, if a lower rate applies to the termination of VoIP traffic than is generally or often the case today, it may be necessary to allow LECs to recover foregone revenue from increased end user charges or from increased universal service subsidies. Without these changes, a proposed rate for traffic termination that might otherwise be reasonable may well be *unreasonable*. But Feature Group IP does not even attempt to address this issue. Nor would this problem be cured by Feature Group IP's suggestion that the FCC restrict application of its Petition to non-rural ILECs as defined by Section 251(f)(1) or to those ILECs with more than 5,000 access lines.²¹ Even if the FCC were to limit forbearance in this manner, there would still be a need to address the extent to which reciprocal compensation rates are reasonable, absent adjustments to end user charges and universal service subsidies, for ILECs that would not fall within either of these definitions of rural ILEC. Feature Group IP makes no attempt to undertake such an analysis. Nor has any other party in this proceeding done so.

In the absence of any meaningful discussion by Feature Group IP in its filings in this proceeding of whether adjustments to the FCC's rules are necessary to render reciprocal compensation for the termination of VoIP traffic reasonable, the FCC cannot conclude that Section 10(a)(1) is satisfied. That is, the Commission cannot determine that Section 251(g) and the associated rules from which Feature Group IP seeks forbearance are unnecessary to ensure that rates for the termination of VoIP traffic are just and reasonable.

Second, and similarly, given that Feature Group IP has not provided any substantial analysis of the broader economic consequences of applying reciprocal compensation to the termination of VoIP traffic (again, assuming *arguendo* that such an outcome could even be achieved via forbearance), the FCC cannot conclude that Section 251(g) and the associated rules from which Feature Group IP seeks forbearance are unnecessary to protect consumers. In its assessment of Core's petition under Section 10(a)(2), the FCC observed in the *Core Forbearance Order* (¶ 16) that, "[s]ignificantly, Core provided no analysis of what the 'real economics of an

²⁰ *Core Forbearance Order* n.56 (quoting USTA Comments in WC Dkt. No. 06-110 at 6).

²¹ See Petition at 11-12. Feature Group IP's offer to exclude small rural ILECs from the scope of its forbearance request merely highlights the faulty logic underlying its Petition. As Embarq explains, if access charges were not applicable to VoIP traffic as Feature Group IP claims, then forbearance could not be used to permit small rural ILECs "to charge for access that, theoretically, they [sic] had previously had no legal right to charge in the first place." Embarq Comments at 10.

offering' might be if the Commission were to grant the forbearance requested" even though "the record suggest[ed] that many LECs depend on access revenues to maintain affordable rates and service quality to consumers." The Commission concluded that the absence of such an analysis made it impossible to determine whether Section 251(g) was unnecessary to protect consumers. The FCC confronts precisely the same problem here. Feature Group IP's Petition and its other filings in this proceeding lack any analysis of the effect that grant of the Petition would have on LECs' access revenues²² despite LECs' arguments that they rely on such revenues to recover the costs associated with use of their networks and provide end users with affordable service.²³ The record demonstrates that applying reciprocal compensation to the termination of VoIP traffic, without at the same time adopting changes to universal service rules and other regulations, would cause LECs in certain areas to increase end user rates substantially or to diminish investment in networks and service quality.²⁴ Either outcome would harm consumers. Moreover, this is true of consumers served by ILECs that would not be exempt from forbearance pursuant to Feature Group IP's proposed definition of exempt "rural" ILECs discussed above.

Feature Group IP's only solution to these problems is for ILECs to "petition the Commission for a waiver of subscriber line charge caps," "seek to initiate new state rates," or "have state or Federal retail rate limits set aside as confiscatory takings."²⁵ But the burden rests on Feature Group IP to show that its Petition meets the requirements of Section 10.²⁶ Instead of satisfying this burden, Feature Group IP offers only the unsubstantiated claim that "[e]xisting ILEC rates are more than adequate to ensure LECs have a reasonable opportunity to recover their prudently incurred costs"²⁷ and, as a result, imposing access charges on the traffic at issue "is

²² See, e.g., AT&T Comments at 22; see also Ad Hoc Manufacturer Coalition Comments at 2 (stating that LEC access charge revenues account for nearly \$9 billion annually); CenturyTel Comments at 9 ("Feature Group IP does not attempt to quantify the amount of traffic covered by its requested relief," "traffic [which] represents billions of dollars of revenues . . .").

²³ See, e.g., Embarq Reply Comments at 20; Windstream Comments at 6 (contending that Feature Group IP's "proposal would fundamentally undermine Windstream and other local exchange [sic] carrier's ability to recover the costs associated with the use of their networks or to provide their end-user customers with affordable, quality voice and broadband services as carriers-of-last-resort"). In addition to Feature Group IP's failure to address this issue, no other party to this proceeding has submitted an analysis of the consequences for ILECs' access charge revenues of applying reciprocal compensation to the termination of VoIP traffic.

²⁴ See, e.g., Ad Hoc Manufacturer Coalition Comments at 2 (explaining that "experience proves that infrastructure investment is among the first casualties when LEC profits decline"); CenturyTel Comments at 9 ("The LEC may internalize [the resulting] shortfall, which could result in reduced investment in infrastructure, or, as Feature Group IP suggested in its Petition, the LEC may seek to recover this shortfall from its customers . . .").

²⁵ Petition at 58-59.

²⁶ See also AT&T Comments at 22.

²⁷ Petition at 58.

wholly unnecessary to protect the future of universal service.”²⁸ Such statements are entirely insufficient to make a showing under Section 10(a)(2) of the Act.²⁹

It is also worth emphasizing that the changes that are likely necessary to ensure reasonable rates and to protect consumers cannot be adopted in a forbearance proceeding. For example, as discussed, the FCC might need to adjust the size of the universal service fund to account for the elimination of implicit subsidies in rural LEC access charges. Such a change must be adopted in a rulemaking proceeding.

Third, as the FCC held in the *Core Forbearance Order* (¶ 16), granting forbearance from Section 251(g) would do *anything but* reduce regulatory uncertainty and promote competition. Numerous parties have explained that grant of Feature Group IP’s Petition without more comprehensive reform would only *increase* regulatory uncertainty and exacerbate existing intercarrier compensation disputes.³⁰ At the very least, granting Feature Group IP’s Petition would not *reduce* uncertainty because, as explained, it would not yield regulatory certainty as to the rate applicable to the termination of VoIP traffic. Accordingly, granting forbearance would neither spur innovation nor increase investment as Feature Group IP claims.³¹ Moreover, granting Feature Group IP’s Petition is unlikely to increase competition because regulatory uncertainty generally serves to diminish market entry and competition.³² The instant Petition thus fails to satisfy the public interest standard of Section 10(a)(3).

²⁸ *Id.* at 61-62.

²⁹ *See, e.g.*, Windstream Comments at 8-9; *see also* Embarq Comments at 29 (“As for end user service rates, it is unrealistic to assume ILECs can solve the problem by charging higher end user rates, even if state commissions approved. Many of Embarq’s rural service areas generate monthly costs of over \$120 a month, and in lower-cost service areas Embarq competes with service providers that do not bear any carrier-of-last-resort obligation.”).

³⁰ *See, e.g.*, COMPTTEL et al. Ex Parte Letter at 3; Broadview et al. Ex Parte Letter at 8 (“Resolution of the IP-to-PSTN compensation question in the context of a forbearance petition would leave unresolved all of the other important compensation issues to which it is inextricably tied and would make resolution of those issue more difficult.”); CenturyTel Comments at 6 (arguing that “grant of Feature Group IP’s Petition in advance of [] a holistic solution [to intercarrier compensation reform] would lead to an irrational business environment and increased regulatory uncertainty where one technology is favored over others, and universal service is thereby undermined”); Texas Statewide Telephone Cooperative Comments at 2 (arguing that “[p]iecemeal ratemaking, as requested by Feature Group IP,” is not in the public interest because “compensation clarification by the FCC is needed for all carriers, not just Feature Group IP”).

³¹ *See Core Forbearance Order* ¶ 16 (explaining that regulatory uncertainty may harm network investment).

³² *See id.*

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III. Conclusion.

For the foregoing reasons, Feature Group IP's Petition must be denied.

Respectfully submitted,

/s/ Thomas Jones

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